

## Holding the Trustee Accountable

### The Importance of the Fiduciary Trust Accounting



**Joseph W. Fleece, III**

**BaskinFleece**

13577 Feather Sound Drive, Suite 550  
Clearwater, Florida 33762

727.572.4545

[www.baskinfleece.com](http://www.baskinfleece.com)

**A TRUSTEE IS UNDER A STRICT FIDUCIARY DUTY TO KEEP AND  
RENDER A COMPLETE AND ACCURATE RECORD.**

A trustee is a person who has broad discretion with very little oversight over someone else's assets. Practically the only time a beneficiary can review what the trustee has done and have an opportunity to challenge those actions is when the trustee provides an accounting to the beneficiary. As such, one of the many duties a trustee has is the duty to inform and account. This fiduciary duty is critically important to ensure that the trustee is properly discharging his or her fiduciary duties in managing the affairs of the trust.

..... < **continue reading here** > .....

**A TRUSTEE HAS A DUTY TO INFORM AND TO ACCOUNT**

The law of trusts has always imposed a duty on the trustee to keep the beneficiary informed as to the administration of the trust and to account to the beneficiary for all actions taken by the trustee. Without a proper accounting disclosing how the trustee has handled the trust affairs, there is little chance of a trustee being held accountable and therefore, the trustee's duties could be breached at will without any means of redress.

The burden of proof is on the fiduciary to show that he has fully performed his duties, and the means for such proof is by providing a sufficient and proper accounting.

In Frethey v. Durant, 48 N.Y.S. 839 (N.Y.A.D. 1 Dept. 1897), it was held that "when a fiduciary relation is shown to exist, and property or property interests have been entrusted to an agent or trustee, the burden is thrown upon such agent entrusted to

render an account, and to show that all his trust duties have been fully performed, and the manner in which they have been performed. It is assumed that the agent or trustee has means of knowing, and does know, what the principal or cestui que trust, cannot know, and is bound to reveal the entire truth”.

This duty to account has been codified in Florida as Florida Statute 736.0813.

**736.0813 Duty to inform and account.**—The trustee shall keep the qualified beneficiaries of the trust reasonably informed of the trust and its administration.

(1) The trustee’s duty to inform and account includes, but is not limited to, the following:

(a) Within 60 days after acceptance of the trust, the trustee shall give notice to the qualified beneficiaries of the acceptance of the trust and the full name and address of the trustee.

(b) Within 60 days after the date the trustee acquires knowledge of the creation of an irrevocable trust, or the date the trustee acquires knowledge that a formerly revocable trust has become irrevocable, whether by the death of the settlor or otherwise, the trustee shall give notice to the qualified beneficiaries of the trust’s existence, the identity of the settlor or settlors, the right to request a copy of the trust instrument, and the right to accountings under this section.

(c) Upon reasonable request, the trustee shall provide a qualified beneficiary with a complete copy of the trust instrument.

(d) A trustee of an irrevocable trust shall provide a trust accounting, as set forth in s. 736.08135, to each qualified beneficiary annually and on termination of the trust or on change of the trustee.

(e) Upon reasonable request, the trustee shall provide a qualified beneficiary with relevant information about the assets and liabilities of the trust and the particulars relating to administration.

Paragraphs (a) and (b) do not apply to an irrevocable trust created before the effective date of this code, or to a revocable trust that becomes irrevocable before the effective date of this code. Paragraph (a) does not apply to a trustee who accepts a trusteeship before the effective date of this code.

(2) A qualified beneficiary may waive the trustee’s duty to account under paragraph (1) (d). A qualified beneficiary may withdraw a waiver previously given. Waivers and withdrawals of prior waivers under this subsection must be in writing. Withdrawals of prior

waivers are effective only with respect to accountings for future periods.

(3) The representation provisions of part III apply with respect to all rights of a qualified beneficiary under this section.

(4) As provided in s. 736.0603(1), the trustee's duties under this section extend only to the settlor while a trust is revocable.

(5) This section applies to trust accountings rendered for accounting periods beginning on or after July 1, 2007

### **WHO IS ENTITLED TO AN ACCOUNTING?**

The trustee holds the trust property for the benefit of the beneficiary. The beneficiary therefore has standing to seek an accounting and it is from that accounting that a beneficiary can enforce the terms of the trust and hold the trustee accountable.

A trustee also has the right to seek an accounting from a co-trustee. It has also been held that the settlor's estate has standing to seek an accounting from the trustee of the settlor's trust, even if the estate is not an income or residuary beneficiary, if the trust document provided for the payment of settlor's debts, estate claims and expenses.

Payiasis v. Robillard, 171 So.2d 630 (Fla. 3d DCA 1965) a trustee was sued a co-trustee for an accounting. The trial court dismissed the complaint for lack of standing. The Appellate Court reversed holding that a trustee indeed has standing to seek an accounting from a co-trustee.

Carvel v. Godley, 939 So.2d 204 (Fla. 4th DCA 2006) A personal representative sued the trustee of the settlor's trust for payment of estate expenses and obligations. It was held that since the trust had a statutory obligation to pay the estate to the extent that the estate had no money to pay its expenses, the personal representative had a sufficient interest in the trust to be entitled to an accounting.

Not only does a beneficiary have standing to seek an accounting, but the trustee is also under an affirmative duty to provide an accounting. As set forth in Florida Statute 736.0813(1) (d) a trustee of an irrevocable trust shall provide a trust accounting to each qualified beneficiary **annually** and on termination of the trust or on change of the trustee.

Accordingly, a trustee is under a duty to keep the qualified beneficiaries of the trust reasonably informed of the trust and its administration and provide each qualified beneficiary with an accounting. In order to obtain an accounting, it is not necessary that the beneficiary allege that the trustee is in default or that a payment is due.

The duty to account is so fundamental to the law of trusts that this duty cannot be diminished by the trust itself. The trust instrument may provide that a trustee need not account or only account informally to a beneficiary, but according to the Florida Trust Code, any such limiting provisions are ineffectual and cannot relieve the trustee of his or her duty to account fully to a qualified beneficiary. See: Florida Statute. 736.0105(2) (s).

Additionally, a qualified beneficiary can only waive his or her right to an accounting if the waiver is in writing. See: F.S. 736.0813(2)

One way to look at the need for an accounting is to consider the trust accounting as the road map which should show all the financial activities of the trustee for the accounting period and is the vehicle that is used by the beneficiaries to hold the trustee accountable.

## **A TRUSTEE IS UNDER A DUTY TO KEEP ACCURATE RECORDS**

A trustee has a duty to maintain clear, complete, and accurate books and records regarding the trust. It is important for the trustee to keep clear and complete records so that the beneficiary can tell whether the trustee has acted with prudence, loyalty, and impartiality and whether the costs of administration have been reasonable and appropriate.

The common law as developed through the courts of equity have held that when one becomes a trustee, he must maintain records of his transactions so complete and accurate that he can show by them his faithfulness to the trust. It is not enough for the trustee to know that he is honestly performing his duty.

In the case of Wood v. Honeyman, 169 P.2d 131 (Or. 1946), the beneficiaries sued the trustee for an accounting, to recover amounts converted. The trial court removed the trustee and entered a money judgment against him. On appeal, the decision was affirmed. This case held in part that "It must be apparent that when one becomes a trustee and thus undertakes to administer an estate for the benefit of another, he must maintain records of his transactions so complete and accurate that he can show by them his faithfulness to his trust. It is not enough for him to know that he is honestly performing his duty. Since, generally, the burden of proof rests upon him to prove his fidelity; he must be able to sustain his position by honest records."

In Florida the Florida Trust Code explicitly states that a trustee shall keep clear, distinct and accurate records of the administration of the trust.

### **736.0810 Recordkeeping and identification of trust property.**

(1) A trustee shall keep clear, distinct, and accurate records of the administration of the trust.

(2) A trustee shall keep trust property separate from the trustee's own property.

(3) Except as otherwise provided in subsection (4), a trustee shall cause the trust property to be designated so that the interest of the trust, to the extent feasible, appears in records maintained by a party other than a trustee or beneficiary.

(4) If the trustee maintains records clearly indicating the respective interests, a trustee may invest as a whole the property of two or more separate trusts.

When he or she assumes the trusteeship, a trustee should set up a bookkeeping system to keep track of all receipts, disbursements and transactions. The trustee should also set up a filing system so that vouchers, receipts, or other documents evidencing receipts, disbursements or capital transactions can be kept safe and produced when needed to substantiate the accounting.

A trustee who, after being requested to do so, refuses to provide a beneficiary with relevant information about the assets of the trust, how the trust is being administered or other material information being considered by the trustee in the discharge of his duties or who refuses to provide an accounting when required, has breached his fiduciary duty owing to the beneficiary.

### **SUFFICIENCY OF THE ACCOUNTINGS**

The Florida Trust Code codifies what should be included in the trust accounting.

#### **736.08135 Trust accountings.**

(1) A trust accounting must be a reasonably understandable report from the date of the last accounting or, if none, from the date on which the trustee became accountable, that adequately discloses the information required in subsection (2).

(2) (a) The accounting must begin with a statement identifying the trust, the trustee furnishing the accounting, and the time period covered by the accounting.

(b) The accounting must show all cash and property transactions and all significant transactions affecting administration during the accounting period, including compensation paid to the trustee and the trustee's agents. Gains and losses realized during the accounting period and all receipts and disbursements must be shown.

(c) To the extent feasible, the accounting must identify and value trust assets on hand at the close of the accounting period. For each asset or class of assets reasonably capable of valuation, the accounting shall contain two values, the asset acquisition value or carrying value and the estimated current value. The accounting must identify each known noncontingent liability with an estimated current amount of the liability if known.

(d) To the extent feasible, the accounting must show significant transactions that do not affect the amount for which the trustee is accountable, including name changes in investment holdings, adjustments to carrying value, a change of custodial institutions, and stock splits.

(e) The accounting must reflect the allocation of receipts, disbursements, accruals, or allowances between income and principal when the allocation affects the interest of any beneficiary of the trust.

(f) The trustee shall include in the final accounting a plan of distribution for any undistributed assets shown on the final accounting.

(3) This section applies to all trust accountings rendered for any accounting periods beginning on or after January 1, 2003.

The account of the trustee should show in detail the items expended and show when, to whom, and for what purposes the payments were made, so that the beneficiary can make a reasonable test of the accuracy of the accounts. A complete statement of principal and income both received and expended, present investments, proposed distributions, payment of expenses, commissions and fees should be included. In those trusts where there is not an



income beneficiary, the allocation between income and principal need not be made. See: F.S. 736.08135(2) (e).

Keep in mind that the function of a fiduciary accounting is two-fold. It is to ensure the beneficiary is fully informed as to what the trustee has done with the trust assets for the accounting period. And, it is to serve as a vehicle for relieving the trustee from further liability for his past actions as trustee. This is the traditional concept of discharge accounting. Both functions are premised on full disclosure by the fiduciary.

In Van Dusen v. Southeast First National Bank of Miami, 478 So.2d 82 (Fla. 3d DCA 1985) the personal representative was under a duty to make a full and fair disclosure of all estate property and a breach of that duty constituted fraudulent concealment. Even though the personal representative had been discharged it had not disclosed all of the estate assets would not be relieved of liability. The court stated that **“the price of immunity is disclosure.”**

Moreover, a trustee cannot fulfill his duty to account by merely turning over to the beneficiary the check register of the trust bank account, a list of checks, bank statements, copies of bills and receipts. It is the duty of the trustee to provide a proper and sufficient accounting.

In re Downey Family Trust, 2010 WL 1487970 (Ariz. App. Div.1, 2010,) an unreported decision out of Arizona, the trustee sent the beneficiary a handwritten check register of the Trust bank account which contained numerous errors, followed by a typewritten list of checks with corrections, bank statements, copies of bills and receipts. The Trustee asserted that these documents gave the beneficiary all the information she needed to fully account for the Trust's receipts and disbursements. The Court disagreed and held that it was the trustee's duty to provide a sufficient accounting. A reasonably prudent person would have prepared a proper accounting rather than submit documentation that would require the beneficiary to do the accounting. Submission of an inaccurate handwritten check register, bank

statements, and bills does not relieve a trustee from her duty to render a proper accounting.

The accounting cannot leave discrepancies in what was received and disbursed and must match the actual bank records or other source documents. In re Martin's Trust Estate, 124 N.W. 2d 297 (Wis. 1963)

Federal income tax returns are not sufficient because federal laws as to what is taxable income and which expenses are deductible differ from a determination of income and principal under the Principal and Income Act.

Jacob v. Davis, 738 A.2d 904 (1999)

### **FAILURE TO KEEP ACCURATE RECORDS**

All presumptions are taken against the fiduciary, and the burden of proof is on the fiduciary to prove that any expenses were proper disbursements.

In Beck v. Beck, 383 So.2d 268 (Fla. 3d DCA 1980), the court found that the personal representative failed to maintain adequate records and that he commingled funds. Due to the lack of adequate records, all presumptions are taken against the personal representative and the burden of proof shifts to the personal representative to prove that any expenses on behalf of the trust were proper disbursements.

If a trustee fails to keep clear, distinct and accurate accounts, all presumptions are against the trustee.

In Traub v. Traub, 135 So.2d 243 (Fla. 2d DCA 1961), a suit was brought to impress a constructive trust on certain property. The trial court entered a final decree impressing a constructive trust and ordering an accounting. An accounting was then rendered. Many of the expenditures were disallowed and the value of certain property that had been improperly conveyed was charged to the constructive trustee. The court found that the testimony consisted of estimates, not any records nor recollection of any specific amounts, and was not sufficient to carry the burden of proof cast upon him either as to his expenditures or as to the reasonable

necessity of other services. On appeal, the trial court's decision was affirmed.

A trustee must have records to support the disbursements made from the trust, and all doubts and obscurities will be resolved against the trustee.

In Bravo v. Sauter, 727 So.2d 1103 (Fla. 4th DCA 1999) an estate beneficiary, among other things, challenged certain expenses by the personal representative, who was also the successor trustee of an inter vivos trust and challenged the trustee's accounting. From an adverse ruling the beneficiary appealed. The Appellate Court reversed on these issues finding that the trustee's accounting did not meet the burden of proving that she had incurred certain miscellaneous expenses for the estate. Further, the Appellate Court found that the trustee's failure to make clear, distinct, and accurate accounts as to her expenditures from the trust's funds required all obscurities and doubts to be resolved against her, and the evidence presented did not meet this standard, since the trustee had nothing to support her testimony that she spent the amounts indicated, nor did she testify that the sums were incurred for trust expenses. Finally, the trustee failed to include income earned by the estate's assets in the accounting.

When the trustee's claim for reimbursement for expenses is based on his own testimony, which is vague and not supported by vouchers, the claim will be disallowed.

In re Strickler Estate, 47 A.2d 134 (Pa. 1946), a testamentary trustee appealed the decree of the lower court fixing her compensation and disallowing her credits for alleged expenditures made by her. The auditing judge had surcharged the trustee for excessive compensation including traveling expenses, telephone calls, and for payments allegedly having been made for the trustee's children. This decision was affirmed on appeal holding that where a fiduciary claims credit for disbursements, the burden rests upon the fiduciary to justify them.

The fiduciary should have proper vouchers or its equivalent, because unsupported testimony is generally insufficient.

## **OBJECTIONS TO THE ACCOUNTING**

A beneficiary who has received an accounting, together with a limitation notice, has six months to challenge and object to the accounting. The challenge to the accounting is done by filing an action in the circuit court asking the court to review and settle the accounting. See: F.S. 736.0201(4) (d). A beneficiary must bring an action in the courts and not merely object to the trustee.

F.S. 736.1008(2) provides: Unless sooner barred by adjudication, consent, or limitations, a beneficiary is barred from bringing an action against a trustee for breach of trust with respect to a matter that was adequately disclosed in a trust disclosure document **unless a proceeding to assert the claim is commenced** within 6 months after receipt from the trustee of the trust disclosure document or a limitation notice that applies to that disclosure document, whichever is received later.

If it appears from the accounting presented that trust assets have not been properly accounted for or otherwise discloses a breach of fiduciary duty by the trustee then the action should be predicated on a breach of fiduciary duty claim.

Prior to filing a complaint, the beneficiary should attempt to obtain information from the trustee as to any questions the beneficiary may have as to the accounting entries, including the inspection of source documents kept by the trustee. If the trustee fails to provide the additional information to the beneficiary, then those documents can ultimately be discovered once a lawsuit has been brought against the trustee either for failing to account, for failing to properly account, or for breach of his fiduciary duty.

When an objection is made, the burden should be on the trustee to show the propriety of an act or transaction set forth in the accounting, but if he

makes a prima facie case, the burden of proving contrary evidence should return to the one making the objection. Baker v. Lake Lorraine, Inc., 562 S.W. 2d 374 (MO. App. 1978).

In Central Florida Council, Boy Scouts of America v. Rasmussen, 2010 WL 1258070 (M.D. Fla. March 29, 2010) it was succinctly stated that “[A]n accounting is a species of compulsory disclosure, predicated upon the assumption that the party seeking relief does not have the means to determine how much-or, in fact, whether-any money properly his is being held by another. The appropriate remedy, particularly where the determinations may be detailed and complex, is an order to account in a proceeding in which the burden of establishing the non-existence of money due to the plaintiff rests upon the defendant. Because of the very nature of the remedy, that burden cannot rest upon plaintiff, but must shift to the defendant once facts giving rise to a duty to account have been alleged and admitted.”

The issues are framed by the accounting and the objections raised thereto. The court should pass only on objections specifically raised and should not decide questions not raised by the parties or collateral questions.

### **REMEDIES FOR FAILURE TO ACCOUNT OR FOR IMPROPER ACCOUNTING**

The failure to account is a breach of fiduciary duty. The failure to keep a true and correct account of all receipts and disbursements made in connection with the administration of the trust is a breach of fiduciary duty. F.S. 736.1001 of the Florida Trust Code has a specific section on remedies for breach of trust. Remedies include the removal of the trustee, reducing or denying compensation to the trustee, requiring the trustee to repay money to the trust or by restoring property to the trust by other means, or any other relief the court deems appropriate.

### **736.1001 Remedies for breach of trust.**

(1) A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.

(2) To remedy a breach of trust that has occurred or may occur, the court may:

- (a) Compel the trustee to perform the trustee's duties;
- (b) Enjoin the trustee from committing a breach of trust;
- (c) Compel the trustee to redress a breach of trust by paying money or restoring property or by other means;
- (d) Order a trustee to account;
- (e) Appoint a special fiduciary to take possession of the trust property and administer the trust;
- (f) Suspend the trustee;
- (g) Remove the trustee as provided in s.736.0706;
- (h) Reduce or deny compensation to the trustee;
- (i) Subject to s. 736.1016, void an act of the trustee, impose a lien or a constructive trust on trust property, or trace trust property wrongfully disposed of and recover the property or its proceeds; or
- (j) Order any other appropriate relief.

(3) As an illustration of the remedies available to the court and without limiting the court's discretion as provided in subsection (2), if a breach of trust results in the favoring of any beneficiary to the detriment of any other beneficiary or consists of an abuse of the trustee's discretion:

(a) To the extent the breach of trust has resulted in no distribution to a beneficiary or a distribution that is too small, the court may require the trustee to pay from the trust to the beneficiary an amount the court determines will restore the beneficiary, in whole or in part, to his or her appropriate position.

(b) To the extent the breach of trust has resulted in a distribution to a beneficiary that is too large, the court may restore the beneficiaries, the trust, or both, in whole or in part, to their appropriate positions by requiring the trustee to withhold an amount from one or more future distributions to the beneficiary

who received the distribution that was too large or by requiring that beneficiary to return some or all of the distribution to the trust.

If the trustee cannot establish that disbursements, sale of assets or other payment of expenses from the trust were proper, the trustee could be held personally liable for those transactions. A trustee could also be held liable for the value of all property improperly conveyed.

In Detroit Bank and Trust Company v. Trust Company of Virgin Islands, Ltd., 644 F. Supp 444 (D.P.R. 1985), the trustee was sued for breach of fiduciary duty. The trustee refused to account for any of the trust assets. The court found the trustee liable for \$2,974,380.00, the full present value of the assets originally placed in the trust plus interest, for failing to keep proper records, to render statements of receipts and disbursements upon request and for failing to allow the successor trustee to have access to the trust books and records.

When a trustee does not maintain any records, the courts have disallowed the expenditures of the trustee and charged those against the trustee as well as the value of property improperly conveyed by the trustee.

## **DEFENSES**

**CONSENT, RELEASE OR RATIFICATION.** A trustee will not be held liable for a breach of trust if the beneficiaries consented to the transaction, ratified the transaction or released the trustee from liability for the transaction. However, the beneficiaries must know of their rights and all material facts relating to the transaction and the consent, release or ratification cannot be induced by improper conduct of the trustee.

### **736.1012 Beneficiary's consent, release, or ratification.**

A trustee is not liable to a beneficiary for breach of trust if the beneficiary consented to the conduct constituting the breach,

released the trustee from liability for the breach, or ratified the transaction constituting the breach, unless:

(1) The consent, release, or ratification of the beneficiary was induced by improper conduct of the trustee; or

(2) At the time of the consent, release, or ratification, the beneficiary did not know of the beneficiary's rights or of the material facts relating to the breach.

**WAIVER.** A beneficiary may waive the trustee's duty to account, but any such waiver must be in writing and the beneficiary may withdraw that waiver as to future periods.

F.S.736.0813 (2) A qualified beneficiary may waive the trustee's duty to account under paragraph (1) (d). A qualified beneficiary may withdraw a waiver previously given. Waivers and withdrawals of prior waivers under this subsection must be in writing. Withdrawals of prior waivers are effective only with respect to accountings for future periods.

Any provisions in the trust document purporting to waive or release the trustee from having to account are ineffectual.

#### **736.0105 Default and mandatory rules.**

(1) Except as otherwise provided in the terms of the trust, this code governs the duties and powers of a trustee, relations among trustees, and the rights and interests of a beneficiary.

(2) The terms of a trust prevail over any provision of this code except:

\*\*\*

(s) The duty under s. 736.0813(1) (c) and (d) to provide a complete copy of the trust instrument and to account to qualified beneficiaries.

#### **STATUTE OF LIMITATIONS AND STATUTE OF REPOSE.**

Once the trustee renders its accounting to the beneficiaries and provided that accounting adequately discloses all matters, then the four year statute of



limitations for breach of fiduciary duty begins to run. A trustee can shorten this statute of limitations to six months by providing a limitation notice with the trust accounting.

F.S. 736.1008(4) (c) "Limitation notice" means a written statement of the trustee that an action by a beneficiary against the trustee for breach of trust based on any matter adequately disclosed in a trust disclosure document may be barred unless the action is commenced within 6 months after receipt of the trust disclosure document or receipt of a limitation notice that applies to that trust disclosure document, whichever is later. A limitation notice may but is not required to be in the following form: "An action for breach of trust based on matters disclosed in a trust accounting or other written report of the trustee may be subject to a 6-month statute of limitations from the receipt of the trust accounting or other written report. If you have questions, please consult your attorney."

If an accounting is not provided to the beneficiaries, or that accounting does not fully disclose all material matters, then the statute of limitations never begins to run as to the non-disclosed matters. Claims may subsequently be barred by a statute of repose contained in the Florida Trust Code. F.S. 736.1008(6).

Even though an accounting has never been provided to a beneficiary, claims of beneficiaries can be barred in Florida after the later of ten years from when the trust terminates, the trustee resigns or the fiduciary relationship ends, provided the beneficiary had actual knowledge of the existence of the trust and the beneficiary's status as a beneficiary during those ten years. Actions can be barred after twenty years from the date of an act or omission of the trustee, provided the beneficiary had actual knowledge of the existence of the trust, and the beneficiary's status as a beneficiary during those twenty

years or forty years after the termination of the trust, the trustee resigns or the fiduciary relationship ends.

The four year statute of limitations, nevertheless, does not begin to run until there has been adequate disclosure or until repudiation. If a beneficiary has actual knowledge of the matter not adequately disclosed in the accounting, and it can be proven by clear and convincing evidence that the beneficiary had actual knowledge, or if there has been a repudiation of the trust by the trustee and the beneficiary has actual or constructive notice of the repudiation, then the four year statute of limitations will bar that claim. F.S. 736.1008(3) (a);

The fact that a trustee has not rendered an accounting for many years is only knowledge of a breach of trust and not repudiation of the trust and thus, the statute of limitations is not triggered. However, if the beneficiary demands an accounting and the trustee refuses, that may be sufficient to put the beneficiary on notice that the trustee has repudiated the trust, thus triggering the four year statute of limitations.

Cassedy v. Alland Investments Corporation, 982 So.2d 719 (Fla. 1st DCA 2008) held that the limitations period did not begin to run because there had been no repudiation of the duty to provide a final accounting. This decision went on to cite *Nayee*, wherein it was held that summary judgment was precluded by a fact question as to when the beneficiaries of a trust had knowledge of the trustee's repudiation of the trust or the adverse possession of the trust assets. "The Nayee court noted that "[k]nowledge that no accounting had been rendered ... is knowledge only of a breach of trust, and not of any repudiation or adverse possession of trust assets"; that is the case here, where Appellant only knew no accounting had been rendered, without knowledge of any repudiation."

**LACHES.** The doctrine of laches is an equitable defense which will bar a cause of action if a person “sleeps on his rights.” If a beneficiary has knowledge that a trustee has denied the existence of the trust or that trustee has repudiated the continued existence of the trust and a sufficient amount of time passes during which the beneficiary failed to take any action to hold the trustee accountable, the courts could deny the beneficiary’s claim for having waited too long to assert it. However, if the trustee by fraud, deception or otherwise misleads a beneficiary, including by remaining silent when he ought to have spoken up so that the beneficiary is unaware of his rights, laches will not bar a subsequent claim brought by the beneficiary.

Anderson v. Northrop, 12 So. 318 (Fla. 1892) Northrop and two other siblings with the same mother as Northrop brought an action against the fourth sibling Anderson to compel Anderson, as executor of *his* mother’s estate, to account for all property which came into *his* mother’s possession as executrix of the estate of the four children’s father. Issues arose considering the mother’s duty as trustee of the husband’s estate for the children, and her dealings that resulted in her absorbing a majority of the estate. After her death, her property went to her one child, Anderson, as sole beneficiary. The court found that the mother’s actions, as trustee, consisted of mismanagement and waste, and that she had ample resources to pay off the husband’s debts without selling off property which she later acquired personally in her name. The court found that the entire management of the estate by the executrix, that led up to, and finally culminated in, the procurement of the sale by her of the realty, was a fraud in law, if not in fact, in which she had full cognizance. The court also reasoned that this action was not barred by the statute of limitations because she was never discharged as trustee, and she occupied that relation as a fiduciary until her death. The court ruled that the complainants and defendant are entitled to a decree from their respective shares from the father’s original will. Anderson, the substituted trustee and executor of his mother’s estate, had to account for all the property that his mother, as trustee, had sold and had returned to her by third parties in her own name, as part of the property to be disbursed by the will.

Likewise, in Smith v. Reddish, 151 So. 273 (Fla. 1933), the Florida Supreme Court again ruled that “in case of an express trust, as between trustee and cestui que trust the statute of limitations has no application and no length of time will bar the claim prior to repudiation or adverse possession by the trustee and knowledge thereof by the cestui que trustent.” See also *Rackley v. Mathews*, 193 So. 69 (Fla. 1940).

The seminal case in Florida on this issue is Nayee v. Nayee, 705 So.2d 961 (Fla. 5th DCA 1998). In that case a beneficiary sued the trustee for an accounting. The lower court ruled on summary judgment that such an action was time barred because of the four year statute of limitations. On appeal the lower court was reversed. The Appellate Court first noted that an action for an accounting against a trustee was historically governed by the concept of common-law laches, not by statutes of limitations, and that laches did not begin to run unless and until the beneficiary had actual knowledge of some unequivocal act in repudiation of the trust or actual knowledge of adverse possession by the trustee. The opinion went on to hold that “... in the case of an express trust, it is not enough that the beneficiary have knowledge of facts which would lead a reasonable person to inquire about a breach of fiduciary duty, although the latter is generally sufficient with respect to other fiduciary relationships. Rather, the beneficiary was required to have *actual* knowledge of the facts later complained of.” The Court went on to cite *Sewell v. Sewell Properties*, 30 So.2d 361 (Fla. 1947) for the proposition that “trust estates are definitely the wards of equity and equity delights in protecting the trust and in

requiring the trustee to render true and honest accounting to his cestui. ... Where the trustee by fraud or deception, or even by keeping quiet when he should speak and account to his cestui, causes the cestui to be ignorant of the rights of the cestui and of the duties of the trustee, laches will not be imputed to the cestui until discovery of the true condition". 30 So.2d at 362.

### **TRUSTEE RELEASED FROM LIABILITY**

Once the trustee renders its accounting to the beneficiaries and provided that accounting adequately discloses all matters, then the four year statute of limitations for breach of fiduciary duty will bar the claims of the beneficiaries. As four years is a rather long time for a trustee to wait to find out if he is off the hook, a trustee can now shorten that time period by providing the beneficiaries with a "limitation notice" at the time of providing the accounting and in accordance with the Florida Trust Code.

This limitation notice advises the beneficiaries that an action by a beneficiary against the trustee for any matter adequately disclosed in the accounting may be barred unless an action is commenced within six months after receipt of the accounting.

However, if a trustee provides a "trust disclosure document" to a beneficiary and that document provides sufficient information so that a beneficiary knows of a claim or reasonably should have inquired into the existence of a claim, that too can start the running of the statute of limitations or the shorter six month limitation if accompanied with a "limitation notice".

A trust disclosure statement is defined as a trust accounting “*or any other written report of the trustee.*” FS 736.1008 (4) (a)

Thus, even if the trustee does not provide the beneficiaries with a fiduciary accounting but does provide a written report which discloses a potential claim, the statute of limitations begins to run.

Another way to shorten the liability period of the trustee, other than by a written waiver, ratification or release, would be for the trustee to bring an action for the court to review and settle the accounting. FS 736.0201(4) (d).

A trustee who sends out an accounting with a limitation notice cannot be compelled to make distributions to beneficiaries within that six month period unless the beneficiaries sign a release.

In Merrill Lynch Trust Company v. Alzheimer’s Lifeliners Assoc., 832 So.2d 948 (Fla. 2d DCA 2002) after litigation involving a determination of who the proper beneficiaries of the trust were (the summary judgment instructed the trustee to make distribution in accordance with that determination of beneficiaries), the trustee sent out its accounting and proposed releases and said that it would disburse upon receipt of the releases. The beneficiaries wouldn’t sign the releases and then filed a motion for writ of execution and a motion to hold the trustee in contempt for failure to make distribution. The trustee then filed an independent action seeking judicial approval of the accounting. The trial court granted the motion for the writ of execution and found the trustee in contempt of court. The trustee appealed on the grounds that a writ of execution deals with a “money judgment” and that the summary judgment was not clear and definite enough that the trustee was under a duty to make “immediate” distribution. The Appellate Court agreed with the trustee and reversed. Moreover, the Court recognized that Florida law requires a trustee to furnish the beneficiaries with an accounting and after receiving the accounting, the beneficiaries have six months to bring an action objecting to the accounting. The motion for contempt was filed only two months after receiving the accounting. **“While Merrill Lynch could have distributed the Trust after the completion of the accounting in August 2001, it would not have been prudent to do so for six months**

**without either a consent to the accounting by the Beneficiaries or approval of the accounting by the court.”**

### **CONCLUSION**

With the office of trustee comes very serious duties and responsibilities. The duty to inform and account is only one of many duties owed by a trustee to a beneficiary. Without keeping meticulous records and accounting for all transactions, the trustee could be personally liable for failing to do so. To avoid liability, a trustee must be vigilant at all times in keeping track of all receipts and disbursements, must be aware of the need to properly allocate these receipts and disbursements between income and principal, and must fully disclose these transactions in a timely manner.



**BaskinFleece**

13577 Feather Sound Drive, Suite 550  
Clearwater, Florida 33762

727.572.4545

<sup>23</sup>  
[www.baskinfleece.com](http://www.baskinfleece.com)